Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

UNION NATIONAL BANK OF WICHITA, KANSAS, A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM THE MISSOURI SUPREME COURT.

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE, FOR A MODIFICATION OF THE OPINION.

DANIEL L. BRENNER,
CORNELIUS ROACH,
Counsel for Appellee.

WILFRED WIMMELL,
FRED L. HOWARD,
ROACH, BRENNER & WIMMELL,
All of Kansas City, Missouri,
Of Counsel.

INDEX

Table of Cases

Authorities

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 500.

UNION NATIONAL BANK OF WICHITA, KANSAS, A CORPORATION, APPELLANT,

VS.

CARL C. LAMB, APPELLEE.

APPEAL FROM THE MISSOURI SUPREME COURT.

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE, FOR A MODIFICATION OF THE OPINION.

Comes now Carl C. Lamb, appellee herein, and prays the Court to grant a rehearing in this cause, or, in the alternative to modify its opinion, and as grounds for said petition states as follows:

I.

The Court has madvertently misconstrued the decision of the Missouri Supreme Court.

II.

Even if it were assumed, *arguendo*, that there was a new and independent Colorado judgment in 1945, the decision of the Missouri Supreme Court would still be correct.

III.

In the event that a rehearing be denied, the opinion of this Court should be modified to clearly remand the case for further proceedings.

Wherefore, appellee prays the Court for a rehearing in said cause, or, in the alternative, for a modification of its opinion.

Respectfully submitted,

DANIEL L. BRENNER,
CORNELIUS ROACH,
Counsel for Appellee.

WILFRED WIMMELL,
FRED L. HOWARD,
ROACH, BRENNER & WIMMELL,
All of Kansas City, Missouri,
Of Counsel.

STATEMENT OF THE CASE.

On December 8, 1927, appellant recovered a judgment against appellee at Denver, Colorado (R. 3). This judgment was revived in Colorado on October 27, 1945 (R. 4). Service in the revival proceedings was by notice mailed to appellee in Kansas City, Missouri, and by delivery to appellee in Kansas City, Missouri, where appellee resided (R. 10, 12).

The present action was filed December 13, 1945, in the Circuit Court of Jackson County, Missouri, at Kansas City (R. 1).

ARGUMENT.

I.

The Court has inadvertently misconstrued the decision of the Missouri Supreme Court.

As the basis for its opinion this Court assumes that the order of revival entered by the Colorado Court on October 27, 1945 (R. 4), had the force and effect of a new and independent judgment, and that the Missouri court in the present action could not look behind that order of revival. This assumption was erroneous. This revival did not have the force and effect of a new and independent judgment, and appellant, who had the burden of proving such issue, neither alleged nor offered any proof to support such a contention.

The petition upon which the present cause of action is based (R. 1-3) does not declare upon a judgment entered in 1945; on the contrary the cause of action as pleaded in this petition is on the judgment rendered by the Colorado Court on December 8, 1927, for $3,493.01, together with the

costs awarded at the time of such judgment and interest from the date of such judgment, *i. e.*, from December 8, 1927.

Attached to this petition were copies of the proceedings of the Colorado Court (R. 3-4). Authenticated copies of these proceedings were offered in evidence (R. 9). These proceedings of the Colorado Court show clearly that there was no new judgment rendered in 1945; they show that the only action of the court was to order that the 1927 judgment "be, and the same is hereby revived." This record demonstrates that there was no judgment of any kind or for any amount entered at that time (1945), but that the only action taken was to extend the life of the 1927 judgment.

If the fact had been that the Colorado revival was a new and independent judgment, it would have been incumbent on appellant to show that fact. This it did not do, and this Court erred in assuming that revival had the effect of creating a new and independent judgment in the absence of such a showing. In fact it is apparent from the Colorado statutes cited and quoted by appellant (3 Colo. Ann. St., Ch. 93, Sec. 2, and Ch. 6, Sec. 54(H)) that only revival is authorized and that a new and independent judgment is not authorized.

The opinion of this Court misconstrues the decision of the Missouri Supreme Court, which court had these facts before it when it reached its decision. The cause of action pleaded by appellant did not purport to be on a judgment entered in 1945, it was specifically based on a judgment for $3,493.01 entered in 1927, together with costs and interest from 1927. The Colorado order of revival did not purport to enter a new judgment in 1945, it only revived, extended the life of, the 1927 judgment. The Colorado statutes under which the 1945 revival was had did not purport to authorize a new and independent judgment, they only authorized a

revival extending the life of the original judgment. Appellant did not present any showing whatsoever that the 1945 revival was anything other than what it purported to be, a mere extension of the life of the original 1927 judgment. Under these circumstances it is implicit in the decision of the Missouri Supreme Court that the revival of 1945 did not result in a new and independent Colorado judgment to which Missouri must give full faith and credit, and which must start the Missouri statute of limitations running anew. This implicit holding is the basis upon which the Missouri opinion rests even if the Missouri Supreme Court did not expressly spell out such decision in its written opinion.

With such a basis the Missouri Supreme Court then quite properly looked to the Missouri statute of limitations and the cases interpreting such statute, and applied it to the facts of the case at bar. Since there was no showing of any 1945 judgment that required full faith and credit, the record proved the contrary, the Missouri Supreme Court then looked to its statute and held that the case did not come within any of the exceptions set up by that statute, and that the cause of action on the 1927 judgment was barred by limitations. This decision was, as the Missouri Supreme Court pointed out, in perfect accord with the controlling decisions of this Court in such cases as *McElmoyle* v. *Cohen*, 38 U. S. 312, 10 L. Ed. 177, and *Bacon* v. *Howard*, 61 U. S. 22, 15 L. Ed. 811.

Once the Missouri Supreme Court had decided, as a basis for its opinion that there was no new and independent Colorado judgment rendered in 1945 behind which it could not look, it then turned to the statute of limitations and held that the statute began to run at the original rendition of the Colorado judgment in 1927, and that the present action was barred thereby. This decision as to when limitations began to run is purely a mat-

ter of state law and does not present any Federal question for review by this Court as was held in *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 40 L. Ed. 986.

Therefore, this Court misconstrued the decision of the Missouri Supreme Court and was in error in assuming that there was a new and independent Colorado judgment in 1945 upon which this suit was based. This Court was also in error when it stated that *Roche* v. *McDonald*, 275 U. S. 499, 72 L. Ed. 365, was controlling in this case. In *Roche* v. *McDonald* this Court enforced the long established rule that the court of the forum cannot look behind the foreign judgment to the cause of action on which it was based and decide whether or not to enforce that original cause of action. The case did not involve any question of the effect of revival, and did not involve the application of the statute of limitation of the forum to suit on a foreign judgment.

II.

Even if it were assumed, arguendo, that there was a new and independent Colorado judgment in 1945, the decision of the Missouri Supreme Court would still be correct.

Appellee does not admit that there was a new and independent Colorado judgment rendered in 1945, but strenuously denies that such is the fact. However, if for the purposes of argument such a judgment is assumed, the result reached by the Missouri Supreme Court is still correct, as has been decided by this Court.

Appellant, in attempting to evade the bar of the Missouri statute of limitations, finds itself on the horns of a dilemma. If it bases its cause of action on the original 1927 Colorado judgment (as in fact it did do), the statute

of limitations has long since run and the action is barred; if it bases its cause of action on a new and independent judgment rendered in 1945, there was no personal service on the defendant to support jurisdiction of the Colorado court to render such a judgment *in personam* and such judgment, if one had been rendered, would violate due process, and therefore be void and not entitled to full faith and credit. It should be remembered that in the Colorado revival proceedings the only service on appellee was had in Kansas City, Missouri, where he resided (R. 12).

In attempting to meet this dilemma appellant has taken two diametrically opposite positions. When faced with the statute of limitations it contends that there was a new and independent judgment rendered in 1945 which demands full faith and credit and which started the Missouri statute of limitations running anew. However, this contention consists wholly and only of a flat statement of this conclusion reiterated in many different ways. Appellant has not shown any authority or facts to support this conclusion, and, as is pointed out hereinabove, everything in the record of this case including the applicable Colorado statutes proves that this conclusion is false. When faced with the lack of service to support the jurisdiction of the Colorado court to render such a new and independent judgment *in personam* in 1945 with the result that such judgment if rendered would be void for lack of due process, appellant contends that the revival proceedings were merely an extension of the original proceedings and did not result in a new and independent judgment *in personam* and therefore did not require personal service to sustain the jurisdiction of the Colorado court and to satisfy due process.

These opposite and inconsistent positions do not resolve the dilemma. In fact, it is not necessary to resolve it since this Court has long since concluded the question by its decision in *Owens* v. *McCloskey, Executor of Henry*, 161 U. S. 642, 40 L. Ed. 837, where it was held that regardless of which view was accepted the plaintiff could not recover; if the revival was considered to be a new judgment, it was void for lack of personal service on the defendant within the jurisdiction of the Court, and if the cause was based on the original judgment, it was barred by the statute of limitations of the forum.

It is, therefore, respectfully submitted that a rehearing should be granted in this case because it is implicit in the decision of the Missouri Supreme Court that there was no new and independent Colorado judgment in 1945, and such decision was the only one that could have been reached from the record in the case; because this Court inadvertently misconstrued the decision of the Missouri Supreme Court and erred in assuming that there was a new and independent Colorado judgment rendered in 1945; because this Court erred in holding *Roche* v. *McDonald* to be controling when said case did not consider the issues involved in the case at bar; because in any event the decision of the Missouri Supreme Court reached the correct result since under the decision of this Court in *Owens* v. *Henry* appellant could not recover on a new and independent 1945 judgment because lack of service rendered it void, and it could not recover on a 1927 judgment because barred by the Missouri statute of limitations.

III.

In the event that a rehearing be denied, the opinion of this Court should be modified to clearly remand the case for further proceedings.

Counsel for appellee are uncertain as to the exact disposition made of this case. The opinion of this Court states on page 6 that the questions of the effect of the 1945 revivor and whether the service satisfies due process are not decided and that "both of those questions will be open on remand of the cause." However, the suggestion that the judgment be vacated, which is the procedure advocated in the dissenting opinion of Mr. Justice Frankfurter, is put aside and the opinion ends with the order "*Reversed.*" Again, in the Journal of Proceedings of this Court as reported in 17 Law Week. 3341, it says: "The judgment is reversed with costs and case remanded to said Supreme Court for further proceedings not inconsistent with the opinion of this Court."

In order to avoid pointless argument between the parties as to the exact status of the case, and to make clear the proper functions of the Missouri courts in further proceedings in this case, this Court is respectfully requested, in the event a rehearing is denied, to modify its opinion so as to clearly order that the case is remanded for further proceedings not inconsistent with its opinion.

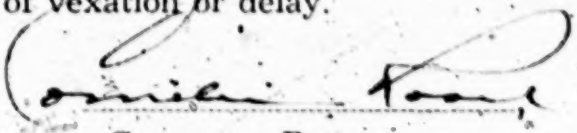
Respectfully submitted,

DANIEL L. BRENNER,
CORNELIUS ROACH,
Counsel for Appellee.

WILFRED WIMMELL,
FRED L. HOWARD,
ROACH, BRENNER & WIMMELL,
All of Kansas City, Missouri,
Of Counsel.

CERTIFICATE.

I, Cornelius Roach, certify that I am one of the counsel for Carl C. Lamb, appellee herein, and that this petition for rehearing or for modification of the opinion is filed in good faith and is believed to be meritorious, and that it is not filed for the purpose of vexation or delay.



CORNELIUS ROACH.